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Securities Commission v Up & Famous Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO D1–25–27 OF 2006
MOHD HISHAMUDIN J
26 JANUARY 2010

C

Civil Procedure — Mode of commencement — Whether correct originating process used — Action under Securities Commission Act 1993 to compel mandatory general offer — Whether defendants raised objection to mode — Whether defendants prejudiced — Whether defect curable under O 2 r 1(1) and (3) of the Rules of the High Court 1980

D

Companies and Corporations — Takeover and merger — Malaysian Code on Take-Overs and Mergers — Acquisition of shares leading to ownership of more than 50% of paid-up capital in public listed company — Failure to make mandatory general offer to other existing shareholders — Failure to comply with direction of Securities Commission to implement compensation scheme — Whether Securities Commission could compel compliance with its direction — Securities Commission Act 1993 ss 33(2), (3), 33A(4) & 33B(3) — Malaysian Code on Take-Overs and Mergers 1998 s 6(1)(b) & (4) — Practice Note 2.3 para 2

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Securities — Takeover — Conduct of prosecution under the Securities Industry Act 1983 — Acquisition of shares by persons presumed to be acting in concert leading to ownership of more than 50% of paid-up capital in public listed company — Failure to make mandatory general offer to other existing shareholders — Whether Securities Commission could compel mandatory general offer — Securities Commission Act 1993 ss 33(2), (3), 33A(4) & 33B(3) — Malaysian Code on Take-Overs and Mergers 1998 s 6(1)(b) & (4) — Practice Note 2.3 para 2

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Takaso Resources Bhd ('Takaso') was an investment holding company incorporated in Malaysia with its shares listed on the Second Board of Bursa Malaysia. The defendants were shareholders in Takaso. The second, third, fourth and fifth defendants were directors of Takaso. The first defendant was a private limited company with the second, third and fourth defendants as its directors. The second to the seventh defendants were family members. Therefore, the Tee family, whether directly or indirectly, had major interests in the management and share capital of Takaso. On 17 January 2002, the first defendant purchased 2m shares in Takaso, thereby increasing its stake in the

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paid-up share capital of Takaso from 41.93% to 50.54%. Each and every defendant was a person presumed to be acting in concert with each other within the meaning of s 33(2) and (3) of the Securities Commission Act 1993 ('the Act'). In consequence, the increase was deemed under the Act to have been combined with the shareholdings of the second to the seventh defendants thereby increasing the collective interest of all the defendants to 57.91%. The defendants thus incurred a legal obligation under s 33B(3) of the Act read together with s 6(1)(b) and s 6(4) of the Malaysian Code on Take-Overs and Mergers 1998 ('the Code') and para 2 of the Practice Note 2.3 (a ruling of the Securities Commission ('the Commission') issued under s 33A(4) of the Act), to make a mandatory general offer to the other existing shareholders of Takaso. The defendants submitted a memorandum to the Commission seeking for an exemption pursuant to s 33C of the Act and the Commission's ruling via Practice Note 2.9.7 from the legal obligation of a mandatory general offer. The defendants claimed that the triggering transaction was a 'genuine mistake' because the first defendant was not aware of the law. On 5 November 2003 the Commission rejected the respondents' application for exemption pursuant to s 33D of the Act directed the defendants to implement a compensation scheme to compensate the other shareholders of Takaso and to pay to the Commission a fine of RM100,000. The defendants paid the fine but was unable to carry out the compensation scheme due to financial difficulties. Subsequently, the Commission filed this originating motion seeking statutory reliefs pursuant to s 33D(3) of the Act to compel the defendants to comply with its direction issued on 5 November 2003. The defendants, inter alia, contended that: (i) s 6(4) was invalid as it was ultra vires the Act on the grounds that s 6(4) was an attempt to re-enact s 33B(2) of the Act and that was legally not permissible; (ii) that the direction of 5 November 2003 was premature and hence invalid in light of the defendants' exemption application; and (iii) that there was nothing in the Act or in the Rules of the High Court 1980 ('RHC') that authorised the commencement of the proceedings by way of an originating motion.

Held, allowing the plaintiff's application with costs:

(1) Ignorance of the law was no defence; nor was financial inability to comply with the 5 November direction. The defendants had failed to carry out an obligation imposed by s 33B(3) of the Act, s 6(1)(b) and s 6(4) of the Code and para (2) of Practice Note 2.3, when they failed to make the mandatory general offer. The defendants also failed to comply with the Commission's direction of 5 November 2003. Hence, the provisions of s 33D(1)(a) were satisfied (see paras 55–56 & 58–59).

(2) As a matter of principle a provision in a subsidiary legislation, particularly where the provision stipulates a prohibition or prescribes a duty or obligation or imposes a penalty, should not repeat a provision that is already there in the parent Act. Section 6(4) of the Code cannot

be read in isolation but must be read together with s 6(1)(b) of the Code, with s 33B(3) of the Act, and with the ruling at para (2) of the Practice Note 2.3. Section 6(4) of the Code, when read with s 6(1)(b) of the Code and para (2) of the ruling at the Practice Note 2.3, were not a total repetition of the provision of s 33B(3); instead, they were meant to supplement s 33B(3); for, s 33B(3) by itself is in a sense not a complete or exhaustive provision because it ends with the words '… except in accordance with the provisions of the Code and any ruling made under subsection 33A(4)' (see paras 65–66).

(3) It is implicit in s 33C that the application for an exemption must be made before making the triggering transaction in question. There will be legal and administrative chaos if the interpretation to adopt is that one is allowed to do the act first and only thereafter apply for an exemption (see para 70).

(4) The defendants had not complained of any prejudice by reason of the Commission proceeding by way of an originating motion. The defendants had also not taken up the objection by way of a preliminary objection or as a main argument. Thus, whilst the action should have been instituted either by way of a writ action or by way of an originating summons, the court did not strike out the originating motion on such technical ground due to O 2 r 1(1) and (3) of the RHC (see paras 74–76).

[Bahasa Malaysia summary

Takaso Resources Bhd ('Takaso') merupakan syarikat pegangan pelaburan yang ditubuhkan di Malaysia dengan saham-sahamnya disenaraikan di papan kedua Bursa Saham Malaysia. Defendan-defendan merupakan pemegang-pemegang saham dalam Takaso. Defendan-defendan kedua, ketiga, keempat dan kelima merupakan pengarah-pengarah Takaso. Defendan pertama merupakan syarikat sendirian berhad dengan defendan-defendan kedua, ketiga dan keempat sebagai pengarah-pengarahnya. Defendan-defendan kedua hingga kesebelas merupakan ahli keluarga. Oleh itu, keluarga Tee, sama ada secara langsung atau tidak langsung, mempunyai kepentingan besar dalam pengurusan dan modal saham Takaso. Pada 17 Januari 2002, defendan pertama telah membeli 2 juta saham dalam Takaso, dengan itu menambahkan pegangannya dalam modal saham berbayar Takaso daripada 41.93% kepada 50.54%. Setiap dan kesemua defendan merupakan seseorang yang dianggap bertindak bersama-sama antara satu sama lain dalam maksud s 33(2) dan (3) Akta Suruhanjaya Sekuriti 1993 ('Akta'). Akibatnya, pertambahan itu dianggap di bawah Akta telah bergabung dengan pegangan saham defendan-defendan kedua hingga kesebelas dan oleh itu menambahkan kepentingan kolektif kesemua defendan-defendan kepada 57.91%. Defendan-defendan oleh itu telah menyebabkan wujud kewajipan sah di bawah s 33B(3) Akta dibaca

bersama perkara 6(1)(b) dan perkara 6(4) Kanun Pengambilalihan dan Penggabungan Malaysia 1998 ('Kanun') dan perenggan 2 Nota Amalan 2.3 (perintah Suruhanjaya Sekuriti ('Suruhanjaya') yang dikeluarkan di bawah s 33A(4) Akta), untuk membuat tawaran am mandatori kepada pemegang-pemegang saham lain Takaso yang sedia ada. Defendan-defendan telah mengemukakan memorandum kepada Suruhanjaya memohon pengecualian menurut s 33C Akta dan perintah melalui Nota Amalan 2.9.7 daripada kewajipan sah tawaran am mandatori. Defendan-defendan mendakwa bahawa transaksi yang tercetus merupakan 'kesilapan yang tulen dan bukan disengajakan' kerana defendan pertama tidak sedar akan undang-undang tersebut. Pada 5 November 2003 Suruhanjaya telah menolak permohonan untuk pengecualian responden-responden menurut s 33D Akta yang mengarahkan defendan-defendan melaksanakan satu skim pampasan untuk memberi pampasan kepada pemegang-pemegang saham lain Takaso dan untuk membayar kepada Suruhanjaya denda sejumlah RM100,000. Defendan-defendan telah membayar denda tersebut tetapi tidak berupaya melaksanakan skim pampasan itu disebabkan masalah kewangan. Berikutan itu, Suruhanjaya telah memfailkan usul pemula memohon relief-relief statutori menurut s 33D(3) Akta untuk mendesak defendan-defendan mematuhi arahannya yang dikeluarkan pada 5 November 2003. Defendan-defendan, antara lain, menegaskan bahawa: (i) perkara 6(4) adalah tidak sah kerana ianya ultra vires Akta tersebut atas alasan bahawa perkara 6(4) adalah percubaan untuk menggubal semula s 33B(2) Akta dan bahawa ia tidak dibenarkan di sisi undang-undang; (ii) bahawa arahan 5 November 2003 adalah pramatang dan justeru itu tidak sah berkaitan dengan permohonan pengecualian defendan-defendan; dan (iii) bahawa tiada apa-apa dalam Akta atau dalam Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang memberi kuasa untuk memulakan prosiding melalui usul pemula.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Kejahilan undang-undang bukan suatu pembelaan; mahupun ketidakmampuan kewangan untuk mematuhi arahan 5 November. Defendan-defendan telah gagal untuk melaksanakan kewajipan yang dikenakan oleh s 33B(3) Akta, perkara 6(1)(b) dan perkara 6(4) Kanun dan perenggan (2) Nota Amalan 2.3, apabila mereka gagal membuat tawaran am mandatori. Defendan-defendan juga telah gagal untuk mematuhi arahan 5 November 2003 Suruhanjaya. Justeru itu, peruntukan s 33D(1)(a) telah dipenuhi (lihat perenggan 55–56 & 58–59).

(2) Sebagai satu perkara menurut prinsip suatu peruntukan dalam perundangan subsidiari, terutamanya di mana peruntukan itu menetapkan larangan atau menetapkan kewajipan atau tanggungjawab atau mengenakan penalti, tidak mengulangi peruntukan yang telah ada

dalam Akta induk. Perkara 6(4) Kanun tidak boleh dibaca secara berasingan tetapi hendaklah dibaca bersama perkara 6(1)(b) Kanun, dengan s 33B(3) Akta, dan dengan perintah perenggan (2) Nota Amalan 2.3. Perkara 6(4) Kanun, apabila dibaca dengan perkara 6(1)(b) Kanun dan perenggan (2) perintah Nota Amalan 2.3, bukan pengulangan menyeluruh peruntukan s 33B(3), sebaliknya, ia bermaksud untuk menambah s 33B(3); kerana, s 33B(3) dengan sendirinya bukan peruntukan yang lengkap atau menyeluruh disebabkan ia berakhir dengan perkataan-perkataan '…except in accordance with the provisions of the Code and any ruling made under sub-s 33A(4)' (lihat perenggan 65–66).

(3) Adalah tersirat dalam s 33C bahawa permohonan untuk pengecualian hendaklah dibuat sebelum transaksi yang tercetus dipersoalkan. Keadaan huru-hara perundangan dan pentadbiran akan berlaku jika pentafsiran yang digunakan adalah yang membenarkan seseorang itu melakukan tindakan terlebih dahulu dan hanya selepas itu memohon untuk suatu pengecualian (lihat perenggan 70).

(4) Defendan-defendan tidak mengadu tentang apa-apa prejudis disebabkan oleh prosiding Suruhanjaya melalui usul pemula. Defendan-defendan juga tidak membuat bantahan melalui bantahan awal atau sebagai hujah utama. Oleh itu, meskipun tindakan patut dimulakan sama ada melalui writ tindakan atau melalui saman pemula, mahkamah tidak membatalkan usul pemula itu atas alasan teknikal disebabkan A 2 k 1(1) dan (3) KMT (lihat perenggan 74–76).]

Notes

For a case on takeover in general, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) para 977.

For a case on whether correct originating process used, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4824.

For cases on Malaysian Code on Take-Overs and Mergers, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 965–968.

Cases referred to

Petaling Tin Bhd v Lee Kian Chan [1994] 1 MLJ 657; [1994] 2 CLJ 346, SC (refd)

Tuan Hj Zulkifli bin Hj Hussain v Suruhanjaya Sekuriti & Ors [2005] 2 AMR 64, HC (folld)

Legislation referred to

Malaysian Code on Take-Overs and Mergers 1998 ss 2, 6, 6(1)(b), (6(4)

Rules of the High Court 1980 O 2 r 1(1), (3), O 5 rr 3, 4, 5

Securities Commission Act 1993 ss 3, 15(1), 33(1), (2), (3), 33A(3), (4), (5), 33B, 33B(2), (3), 33C, 33D, 33D(1), (1)(a), (d), (3)

Securities Industry Act 1983

Tommy Thomas (Shanti Geoffrey with him) (Tommy Thomas) for the plaintiff. MK Chen (MK Chen & Leong) for the defendants.

Mohd Hishamudin J:

[1] This is an originating motion filed by the plaintiff the Securities Commission of Malaysia ('the Commission'), seeking statutory reliefs pursuant to s 33D(3) of the Securities Commission Act 1993 ('the Act'), to compel the defendants to comply with a direction of the commission issued on 5 November 2003 pursuant to sub-s (1) of the same s 33D.

[2] The relevant parts of s 33D of the Act provide:

> 33D Action by commission in cases of non-compliance with Code and rulings
>
> (1) Where any person who is under an obligation to comply with, observe or give effect to the provisions of the Code or any ruling made under subsection 33A(4), fails to comply with, observe or give effect to any such provision of the Code or ruling (hereinafter referred to as the 'defaulting person'), the Commission may take one or more of the following actions:
>
> (a) direct the defaulting person to comply with, observe or give effect to any such provision of the Code or ruling;
>
> (2) ...
>
> (3) The Court may, in a case where the Commission gives a direction under paragraph (1)(a), on an application by the Commission, make an order directing the defaulting person to comply with, observe or give effect to those provisions of the Code or rulings ...

[3] In the present case I granted the orders sought by the plaintiff (with costs). They are as follows:

(a) an order that, within 21 days of being ordered to do so, each of the defendants whether by themselves or by their servants or agents, do circulate the documents relevant to the compensation scheme to all the shareholders of Takaso;

(b) an order that, within 21 days of the deadline imposed in the said relevant documents, the defendants do pay the respective portions to all the shareholders of Takaso who are entitled to receive proceeds of the compensation; and

(c) an order that, in the event any defendant fails to comply with the orders referred to in paras (a) and (b) above within the specified period, the

plaintiff be entitled to take execution proceedings under the Rules of the High Court 1980 and/or seek leave of this court to punish such defendant for contempt of court for failure to comply with orders of court.

[4] I shall now give my grounds.

[5] The Securities Commission is a body corporate established under s 3 of the Securities Commission Act and is the sole regulatory agency for the capital market in Malaysia. The Commission is charged by the Act with the duty of supervising and monitoring the activities of market institutions (for example, Bursa Malaysia), the conduct of public listed companies, and regulating all persons licensed under the Securities Industry Act 1983 (see s 15(1) of the Securities Commission Act). The Commission is empowered by statutes to enforce both the Act and the Securities Industry Act.

[6] One of the functions of the Commission is to maintain investors' confidence in the securities market by providing adequate protection to such investors. In carrying out this function, the Commission may enquire into corporate deals that are open to question in order to preserve the integrity of the Malaysian capital market and to maintain investors' confidence.

[7] The Commission is thus entrusted by Parliament to protect investors, particularly, individual members of the investing public, who purchase shares of public companies whose shares are traded on Bursa Malaysia.

[8] Section 33A(1) of the Act confers on the Minister of Finance the power to prescribe a code with regard to takeovers, mergers and compulsory acquisitions. Accordingly, the Minister of Finance prescribed the Malaysian Code on Take-Overs and Mergers 1998 ('Code') that came into force on 1 January 1999. The Code contains principles and rules governing the conduct of all persons involved in a takeover offer, merger or compulsory acquisition of a public listed company (see s 33A(3) of the Act). The Commission is charged with the responsibility of administering the Code (see s 33A(4) of the Act). Section 33A(5) of the Act imposes on the Commission a duty of ensuring that the acquisition of voting shares or control of companies take place in an efficient, competitive and informed market, including the duty to ensure, among other things, that there is fair and equal treatment of all shareholders, in particular, minority shareholders, in relation to takeovers, mergers and compulsory acquisitions.

[9] In the present case the material facts are undisputed. They are as follows.

[10] Takaso Resources Bhd ('Takaso') is a company incorporated in Malaysia on 28 July 1997. As at 23 August 2002, the company's authorised share capital was RM50m comprising of 50m RM1 shares. Its paid-up capital was RM23m.

[11] Takaso is an investment holding company. Its shares were listed for trading on the Second Board of Bursa Malaysia on 16 March 1999.

[12] As at 16 January 2002, the seven defendants owned the following shares in Takaso:

No	Shareholder	No of shares	Percentage
1	First defendant	9,730,000	41.93%
2	Second defendant	547,932	2.36%
3	Third defendant	310,620	1.34%
4	Fourth defendant	358,651	1.54%
5	Fifth defendant	138,310	0.60%
6	Sixth defendant	281,234	1.21%
7	Seventh defendant	75,155	0.32%
.	.	11,441,902	49.30%

[13] The second defendant (Dato' Tee How Cut), third defendant (Datin Teo Beng Ha), fourth defendant (Tee Tze Chern) and fifth defendant (Lim Kwee Hua) are directors of Takaso.

[14] The first defendant, namely, Up & Famous Sdn Bhd ('Up & Famous'), is a locally incorporated private limited company. The second, third and fourth defendants are directors of Up & Famous.

[15] The fifth defendant (Lim Kwee Hua) is the wife of the fourth defendant. The fourth defendant, sixth defendant (Tee Bee Leng) and seventh defendant (Lily Tee) are the children of the second and third defendants. Therefore, the Tee family, whether directly or indirectly, have major interests in the management and share capital of Takaso.

[16] On 17 January 2002, Up & Famous purchased 2m shares in Takaso, thereby increasing its stake in the paid-up share capital of Takaso from 9,730,000 shares to 11,730,000 shares, and from 41.93% to 50.54%.

[17] Thus, each and every defendant is a person presumed to be acting in concert with each other within the meaning of sub-s (2) and (3) of s 33 of the Act. This presumption has not been rebutted by the defendants.

[18] Division 2 of the Act makes reference to the expression 'persons acting in concert'. This expression is defined in sub-s (2) of s 33 of the Act to mean:

> (2) For the purposes of this Division, a reference to 'persons acting in concert' shall be construed as a reference to persons who, pursuant to an agreement, arrangement or understanding, co-operate to —
>
> (a) acquire jointly or severally voting shares of a company for the purpose of obtaining control of that company; or
>
> (b) act jointly or severally for the purpose of exercising control over a company.

[19] Section 33(3) of the Act provides, among others, that —

> (3) Without prejudice to the generality of subsection (2), the following persons shall be presumed to be persons acting in concert unless the contrary is established:
>
> (a) ...
>
> (b) a corporation and any of its directors, or the parent, child, brother or sister of any of its directors, or the spouse of any such director or any such relative.

[20] In consequence, when Up & Famous increased its stake in Takaso on 17 January 2002 from 41.93% to 50.54%, that increase is deemed under the Act to have been combined with the shareholdings of the second to the seventh defendants.

[21] Accordingly, the transaction that Up & Famous entered into with regard to its shares in Takaso had the effect in law of increasing the collective interest of all the defendants (presumed to be acting in concert — and this presumption has not been rebutted), from 49.30% to 57.91%.

[22] By engaging in the transaction, the defendants had incurred a legal obligation to make a mandatory general offer to the other existing shareholders of Takaso. Such an obligation arises by reason of the following provisions:

(a) sub-s (3) of s 33B of the Act;

(b) s 6(1)(b) and s 6(4) of the Code; and

(c) para 2 of the Practice Note 2.3 (a ruling of the Commission issued under s 33A(4) of the Act).

[23] The obligation arises because the defendants are collectively holding more than 33% but less than 50% of the voting shares of Takaso, and the defendants collectively acquired in a six month period more than 2% of the voting shares of Takaso. The mandatory general offer that the law requires the defendants to make is to offer to purchase the voting shares of the balance 42.09% belonging to other shareholders other than the defendants (called the 'offeree shareholders' under the Code).

[24] Subsection (3) of s 33B of the Act states:

> (3) Subject to section 33C, an acquirer who has obtained more than thirty-three per centum of the voting shares in a company but less than fifty per centum of the voting shares in that company, shall not acquire any additional voting shares in that company, except in accordance with the provisions of the Code and any ruling made under subsection 33A(4).

[25] Section 6(1)(b) and 6(4) of the Code stipulate:

> (6) Application of this Part
>
> (1) This Part applies to —
>
> (a) ...
>
> (b) an acquirer who holds more than 33% but less than 50% of the voting shares of a company and such acquirer acquires in any period of six months more than 2% of the voting shares of the company.
>
> ...
>
> (4) An acquirer to whom this Part applies shall extend an offer to the offeree shareholders in accordance with the requirements of this Code.

[26] Section 6 is in Part II of the Code.

[27] The Code does not define the word 'acquirer'. But the definition of 'acquirer' can be found at s 33(1) of the Act. There the word 'acquirer' is defined as:

> 'acquirer' means —
>
> (i) a person who acquires or propose to acquire control in a company whether the acquisition is effected by the person or by an agent; or

A (ii) two or more persons who, acting in concert with one another, acquire or propose to acquire control in a company, whether the acquisition is effected by the persons or by an agent.

B **[28]** Section 2 of the Code defines 'offeree shareholders' as:

'offeree shareholders' means holders of voting shares of the offeree to which the takeover offer relates other than the offeror.

C **[29]** Paragraph (2) of Practice Note 2.3 provides:

(2) Where the combined holding of a group of persons acting in concert is more than 33% and less than 50% of the voting shares of an offeree, and thereafter any member of that group acquires additional voting shares of the offeree such that the combined holding of the group is
D increased by more than 2% in any 6 month period, Part II of the Code will apply to all the members of the group of persons acting in concert.

[30] The above Practice Note is a ruling made by the Commission pursuant to s 33A(4) of the Act. Subsection (4) of s 33A states:
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(4) The Commission shall administer the Code according to the objectives specified in subsection (5) and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code; and without limiting the generality of the
F foregoing, may —

(a) issue rulings from time to time, interpreting the Code;

(b) issue rulings on the practice and conduct of persons involved in or affected by any takeover, merger or compulsory acquisition, or in the
G course of any takeover, merger or compulsory acquisition; and

(c) enquire into any matter relating to any takeover offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission deems fit with respect thereto.
H

[31] The rationale behind compelling a person to carry out a takeover offer is explained by Dato' Loh Siew Cheang in his work *Corporate Powers Accountability* (2nd Ed) at p 835 as follows:

I The underlying reason why this category of persons is compelled by statute to make a mandatory offer is that following a change in control in a company, the general body of shareholders ought to be given an opportunity to consider whether they would wish to make an exit or remain as shareholders with the new controller at the helm.

[32] This rationale was confirmed by the Supreme Court in *Petaling Tin Bhd v Lee Kian Chan* [1994] 1 MLJ 657; [1994] 2 CLJ 346, where the court said (at p 675 (MLJ); p 361 (CLJ)):

> Here, it would be useful to keep in the forefront of our minds, the object of the concert party provisions which counsel for the appellant aptly described as the prevention of the takeover of company control by stealth. More particularly, r 34 requires any person or group of persons acting in concert who acquires shares in a company carrying more than 33% of voting rights to make a bid for all the other shares of that company at the highest price paid by the offeror for the shares in the previous twelve months. Such a percentage of the voting power is regarded as control and so the policy of the Code is to require a new controller to give an opportunity to the other shareholders of quitting the company and sharing in the price paid for the control or its consolidation because the character of the company, in a sense, may have changed.

[33] On 20 September 2002, Alliance Merchant Bank, acting on behalf of the defendants, submitted a memorandum to the Commission seeking for an exemption pursuant to s 33C of the Act and the Commission's ruling via Practice Note 2.9.7 from the legal obligation of a mandatory general offer. Numerous admissions were made on behalf of the defendants in the said memorandum to the effect that they had entered into the transaction ('triggering transaction') that resulted in the triggering of the legal obligation on their part to make the mandatory general offer. The defendants claimed in the said memorandum that as the triggering transaction only involved an acquisition by Up & Famous, the triggering transaction was a 'genuine mistake' because Up & Famous were not aware of the law.

[34] By a letter of 19 November 2002, the Commission asked for an explanation from the defendants as to why action should not be taken against them under s 33D of the Act by reason of the failure to make the mandatory general offer.

[35] By a letter of 29 November 2002, the defendants replied stating that they had inadvertently made a mistake.

[36] By a letter of 5 November 2003, the Commission rejected the respondents' application for exemption and, pursuant to s 33D of the Act, directed:

(a) that the defendants implement a compensation scheme to compensate the other shareholders of Takaso as at 17 January 2002 (when the said transaction was completed and therefore when the mandatory general offer ought to have been made) at RM1.60 per Takaso share ('compensation scheme'); and

(b) that the defendants pay to the Commission a fine of RM100,000.

[37] The said letter concluded by giving the defendants 14 days to pay the fine and to put forward proposals for the compensation scheme.

[38] By a letter of 14 November 2003 the defendants wrote to the Commission seeking a two-month extension of time until 5 January 2004 to furnish details of the compensation scheme.

[39] By a letter of 17 November 2003 Up & Famous sent a cheque of RM100,000 to the Commission being payment of the fine.

[40] By a letter of 9 December 2003 the Commission informed the defendants that their request for an extension of time until 5 January 2004 was approved.

[41] By a letter of 5 January 2004 Hwang-DBS Securities Bhd (the new adviser of the defendants in place of Alliance Merchant Bank) submitted the proposals of the defendants with regard to the compensation scheme. By their letter of 18 March 2004 the Commission accepted the scheme.

[42] An announcement to the Bursa was made by Hwang-DBS on 5 April 2004 with regard to the acceptance by the Commission of the proposals put forward on behalf of the defendants as to the compensation scheme.

[43] By a letter of 24 June 2004, Hwang-DBS submitted to the Commission the first draft offer and compensation document containing details of the compensation scheme. According to the time-table set out in the said letter, payment for the mandatory general offer exercise would be settled by the defendants to the other shareholders of Takaso by November 2004.

[44] On 8 December 2004, an announcement was posted on the Bursa Malaysia website by Hwang-DBS with regard to the making of the mandatory general offer by the defendants for the remaining Takaso shares.

[45] By a letter of 28 January 2005, Hwang-DBS informed the Commission that the dispatch of the offer and compensation document to the beneficiaries of the mandatory general offer was still pending because of the difficulty that the defendants were facing in securing finance to make the mandatory general offer.

[46] By a letter of 17 February 2005, Hwang-DBS informed the Commission that the defendants were finalising the necessary arrangement to secure sufficient financial resources to implement the mandatory general offer, and that under the revised time-table full payment would be made by May 2005.

[47] By a letter of 26 April 2005, Hwang-DBS informed the Commission that the defendants were still not in a financial position to carry out the mandatory general offer exercise, and applied for more time from the Commission.

[48] By a letter of 23 August 2005 to Hwang-DBS, the Commission gave the defendants a further three months, that is, until 23 November 2005 to comply.

[49] Despite the extended period of three months, the defendants still failed to carry out the compensation scheme.

[50] By letter of 22 December 2005, the defendants (through Hwang-DBS) again sought for more time from the Commission.

[51] But this time the Commission was firm. By a letter of 7 April 2006 the Commission informed Hwang-DBS that by reason of the repeated failure of the defendants to implement the compensation scheme, the Commission had decided to exercise its powers under s 33D(1)(d) of the Securities Commission Act and to impose with immediate effect a moratorium on all the Takaso shares owned by the defendants, the consequence being that the defendants were not allowed to sell or otherwise deal with their shares until the compensation scheme is completed.

[52] By letter of 14 April 2006, Hwang-DBS gave details of the shares owned by each of the defendants in Takaso which are the subject of the moratorium, and further stated that this information had been conveyed to Bursa Malaysia.

[53] In the circumstances, the present action was instituted by the Commission on 22 December 2006.

[54] In an affidavit affirmed on 26 March 2007 by the seventh defendant, Lily Tee, and filed in this proceeding on behalf of all the defendants, the following averments are made:

(a) the defendants were unaware of the requirement of making a mandatory general offer under the Code when making the impugned transaction;

A (b) any breach of the Code was unintentional;

(c) the defendants took steps to implement the compensation scheme, as directed by the Commission;

(d) the defendants did not have the financial resources to carry out the
B compensation scheme; the total cost of which was about RM12.14m at the end of 2006; and

(e) the orders sought by the Commission in this proceedings, if granted by the court, will be in vain because the defendants are not capable of
C carrying out the same.

[55] Needless to say, ignorance of the law is no defence; nor is financial inability to comply with the 5 November direction.

D **[56]** In the present case I am granting the relief sought by the Commission as clearly — and it is undisputed — that in the first place there has been a failure on the part of the defendants to carry out an obligation imposed by the Act, by the Code and by a ruling made under the Code, in particular, s 33B(3) of the Act, s 6(1)(b) and s 6(4) of the Code and para (2) of Practice
E Note 2.3 (a ruling of the Commission). This happened when the defendants failed to make the mandatory general offer.

[57] Secondly, it is also clear and undisputed that, by reason of the defendants' failure to carry out the obligation, there has been a direction by
F the Commission dated 5 November 2003 made pursuant to s 33D(1)(a) of the Act directing the defendants to implement a compensation scheme.

[58] Thirdly, there has been failure on the part of the defendants — and it is admitted — to comply with the Commission's direction of 5 November
G 2003.

[59] Hence, the provisions of s 33D(1)(a) are satisfied.

H **[60]** I have the powers to grant the orders sought by reason of sub-s (3) of s 33D.

[61] I now propose to deal with three of the several issues raised by Encik Chen, learned counsel for the defendants.

I

[62] Firstly it is submitted by Encik Chen that there could not have been a breach of the Code as s 6(4) is invalid in the first place. Learned counsel argues that s 6(4) of the Code is invalid as this provision is ultra vires the Act. It is ultra vires the Act because (so argues counsel) s 6(4) is an attempt to

re-enact sub-s (2) of s 33B of the Act and that is legally not permissible. Learned counsel refers to the obiter dicta of Abdul Aziz Mohamad J (as he then was) in *Tuan Hj Zulkifli bin Hj Hussain v Suruhanjaya Sekuriti & Ors* [2005] 2 AMR 64. In this case cited the learned judge said (at pp 74–75):

> (26) I turn now to the position under the 1998 Code. In the 1998 Code, which the Minister prescribed on December 31 1998, the obligation to make a takeover offer is expressed in s 6. Subsection (4) says that 'An acquirer to whom this part applies shall extend an offer to the offeree shareholders in accordance with the requirements of this Code'. The Part mentioned is Part II. By s 6(1)(a), Part II applies to 'an acquirer who has obtained control in a company'. In s 2(1) 'offeree shareholders' is defined as 'holders of voting shares of the offeree to which the takeover offer relates other than the offeror'. The new s 33(1) of the 1993 Act defines 'offeree' as 'a company whose voting shares are subject to a takeover offer'. The resultant effect of sub-s (4) of s 6 of the 1998 Code is that an acquirer who has obtained control in a company shall extend an offer to holders of voting shares of the company, other than the acquirer, in accordance with the requirements of the Code. The effect is similar in nature to that of sub-s (2) of s 33B of the 1993 Act. The effect shows up sub-s (4) of s 6 of the 1998 Code as an attempt to re-enact in the Code on December 31 1998 what had already been enacted in 1995 in sub-s (2) of s 33B of the 1993 Act. A serious question, therefore, arises whether sub-s (4) of s 6 of the 1998 Code is ultra vires the Act, or is a futile provision. It is a fundamental principle of legislation that subsidiary legislation should not provide for what the principal legislation has already provided, resulting in a person having to comply with two provisions about the same matter, more so if the provisions are not identical in wording and impose obligations having different sanctions. If an Act of Parliament prohibits an activity unless licensed in accordance with rules made under it, the rules should only provide for matters relating to licensing but should not also lay down the prohibition again. Thus, with sub-s (2) of s 33B laying down the requirement to make a takeover offer 'in accordance with the provisions of the Code', one would expect the Code to make provisions in accordance with which a takeover offer is to be made but not also to lay down again the requirement to make a takeover offer.
>
> (27) Indeed by reflecting on the description in sub-s (3) of s 33A of the Code of The matters that the Minister is empowered to prescribe shall contain, it may become apparent that the Code is not intended to contain the requirement to make a takeover offer. As far as a takeover is concerned, the Code is to contain 'principles and rules governing the conduct of all persons or parties involved in a takeover offer …', which is defined in the new s 33(1), in relation to a company, as 'an offer made to acquire all or part of the voting shares … in the company'. It is firstly to be observed that the Code is meant to govern conduct. Secondly, it is important to note that the conduct to be governed by the Code is that of persons or parties involved in a takeover offer. There is a presupposition of the existence of a requirement to make a takeover offer and the requirement is found to exist

A in sub-s (2) of s 33B, which envisages, as I have already said, that matters in accordance with which a takeover offer shall be made — procedural matters — shall be provided for in the Code.

B **[63]** The learned judge then goes on to conclude:

(29)If, therefore, sub-s (4) of s 6 of the 1998 Code is ultra vires and therefore void, then a failure to make a takeover offer is not a failure 'to comply with, observe or give effect to any such provision of the Code' and that failure does not provide the condition for the exercise of the C Commission's powers under s 33D and those powers cannot be exercised.

[64] Since the passage above refers to sub-s (2) of s 33B, I shall here reproduce the said provision:

D

(2) Subject to section 33C, an acquirer who has obtained control in a company shall make a takeover offer, other than in respect of voting shares of the company which at the date of the offer are already held by the acquirer or which the acquirer is entitled to exercise, in accordance with the provisions E of the Code and any ruling made under subsection 33A(4).

[65] I am, with respect, in agreement with the view (albeit obiter) as expressed by Abdul Aziz Mohamad J in *Tuan Hj Zulkifli bin Hj Hussain* in F that as a matter of principle a provision in a subsidiary legislation, particularly where the provision stipulates a prohibition or prescribes a duty or obligation or imposes a penalty, should not repeat a provision that is already there in the parent Act. It is a futile (and confusing) exercise and the provision in the subsidiary legislation will be of no legal effect as the matter has already been G provided for in the parent Act, and the court must only enforce the provision in the parent Act and not the 'repeating' provision in the subsidiary legislation. Indeed, a legislative draftsman when drafting subsidiary legislations is always at pains and constantly cross-checking with the parent legislation so as not to inadvertently fall into the error of repeating in the H subsidiary legislation provisions that are already provided for in the parent Act.

[66] However, in the present case, in my judgment, s 6(4) of the Code cannot be read in isolation but must be read together with s 6(1)(b) of the I Code, with s 33B(3) of the Act, and with the ruling at para (2) of Practice Note 2.3. In the context of our case, as the relevant provision of the Act is s 33B(3) (and not s 33B(2)), the pertinent question that needs to be asked is therefore not whether s 6(4) is an attempt to repeat the provision of sub-s (2) of s 33B (that is the issue dealt with by the learned judge in *Tuan Hj Zulkifli*

bin Hj Hussain albeit obiter), but rather whether s 6(4) read together with s 6(1)(b) and the ruling at para (2) of Practice Note 2.3 are provisions that attempt to repeat the provision of sub-s (3) of s 33B of the Act. In other words, in the present case, in the context of s 33B, what is at hand is a sub-s (3) situation and not a sub-s (2) situation. In my view, s 6(4) of the Code, when read with s 6(1)(b) of the Code and para (2) of the ruling at Practice Note 2.3, are not a total repetition of the provision of sub-s (3) of s 33B (although there is, I must concede, some degree of overlapping); instead, they are meant to supplement sub-s (3) of s 33B; for, sub-s (3) of s 33B by itself is in a sense not a complete or exhaustive provision because it ends with the words '… except in accordance with the provisions of the Code and any ruling made under subsection 33A(4)'. Accordingly, it is to be noted that the 'more than 2%', 'in any period of six months' and 'shall extend an offer' stipulations are provisions not found in sub-s (3) of s 33B, but are, instead, provided for in s 6(1)(b), s 6(4) and para (2) of the Commission's ruling at Practice Note 2.3. These stipulations supplement sub-s (3) of s 33B.

[67] Secondly, it is argued by learned counsel for the defendants that the direction of 5 November 2003 was premature and hence invalid as there was an application for an exemption by the defendants submitted to the Commission on 20 September 2002 pursuant to s 33C of the Act and Practice Note 2.9.7 (a ruling of the Commission); and that application for exemption (so argues counsel) must be dealt with first before the Commission made the 5 November direction. Section 33C provides:

> 33C Exemptions
>
> (1) Subject to subsection 33A(5), the Commission may grant exemption in writing to any particular person or takeover offer or to any particular class, category or description of persons or takeover offers from the provisions of this Division, the Code and any ruling made under subsection 33A(4).
>
> (2) Any exemption granted under subsection (1) may be subject to any conditions, restrictions or limitations as may be imposed by the Commission.

[68] Encik Tommy Thomas, learned counsel for the plaintiff, in his reply argument, submits that any application for an exemption must be made by the defendants before they made the triggering transaction. He refers to Practice Note 1.4 (a ruling of the Commission) which says:

Practice Note 1.4

General guidelines for application for exemptions from mandatory offers

In relation to an application for an exemption from making a mandatory offer, consultation with the Commission at an early stage is essential and applications for an exemption should be submitted prior to the obligation to make a mandatory offer under Part II of the Code arising.

[69] Encik Chen, on the other hand, submits that there is no requirement under s 33C that the application for exemption must be made prior to the making of the triggering transaction as s 33C of the Act does not say so. In other words, s 33C is silent on the issue of timing. He further contends that Practice Note 1.4 is invalid as it is ultra vires s 33C, and it is ultra vires because it imposes the requirement that the application for an exemption must be made prior to entering into the triggering transaction. Learned counsel argues that this requirement is inconsistent with s 33C.

[70] Section 33C as an exemption provision is general in nature, but it is supplemented by Practice Note 2.9.7 and Practice Note 1.4. It is true that s 33C is silent on the question as to when the application for an exemption should be made. However, in my judgment it is implicit in s 33C that the application for an exemption must be made before making the triggering transaction in question. There will be legal and administrative chaos if the interpretation to adopt is that one is allowed to do the act first (where the law is clear as to the immediate legal consequence of the act) and only thereafter apply for an exemption. And it is all the more so where the application for exemption was made way long after the event. For instance, in the present case, the triggering transaction occurred on 17 January 2002 but the application for exemption was made only nine months later, that is, on 20 September 2002. And no plausible explanation is given for the long delay. With respect, such an interpretation (that an application for exemption could still be made even after the legal obligation has been triggered) makes a mockery of the law. To my mind, it cannot be the intention of Parliament when enacting s 33C to allow a 'do it first and apply for the exemption later' sort of situation. The respondents ought to have known of the consequential legal obligation before making the triggering transaction. Therefore, there is nothing ultra vires about Practice Note 1.4. This ruling by the Commission (that is, Practice Note 1.4) merely gives effect to the implied intention of Parliament in enacting s 33C.

[71] In any case the Commission did act on the application for exemption and it had rejected the application by its letter of 5 November 2003 (that is the very same letter that issued the 5 November direction, although the letter

was rather poorly worded on the rejection of the exemption) — although the Commission, as a matter of law, need not have to entertain the application in the light of Practice Note 1.4.

[72] Finally it is submitted by learned counsel for the defendants that the proceedings adopted by the applicant, that is by way of originating motion is wrong as there is nothing in the Act or in the Rules of the High Court 1980 (the 'RHC') that authorises the applicant to commence the present proceedings by way of an originating motion. Learned counsel refers to O 5 r 5 of the RHC which reads:

Proceeding to be begun by motion or petition

5 Proceedings may be begun by originating motion or petition if, but only if, by these rules or by under any written law the proceedings in question are required or authorised to be so begun.

[73] On this ground, learned counsel for the defendants applies to this court that this originating motion be struck out in limine.

[74] Now, I observe that for the purpose of this proceedings both sides have been filing affidavits (this procedural issue was raised by the defendants in their first affidavit). However, counsel for the defendants, apart from taking up this technical point, has not complained of any prejudice suffered by the defendants by reason of the plaintiff having proceeded by way of an originating motion. Indeed, counsel has not taken up the objection by way of a preliminary objection; nor has he taken up this point as his main argument.

[75] I accept that the mode of proceedings as adopted by the plaintiff is legally wrong, and that the action should have been instituted either by way of a writ action or by way of an originating summons (but I think it is more appropriate to be by way of originating summons since there is no dispute as to facts — see O 5 rr 3 and 4). There is nothing in the Act or in the RHC that authorises the plaintiff to commence the present action by way of an originating motion.

[76] Be that as it may, I am, however, not minded to have this originating motion struck out on such technical ground. I think I am bound by sub-r (1) and (3) of O 2 r 1 of the RHC which stipulate:

Order 2 Effect of Non-Compliance

Rule 1 Non-compliance with rules (O 2 r 1)

(1) Where, in beginning or purporting to begin any proceedings or at any stage

in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) ...

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

Plaintiff's application allowed with costs.

Reported by Kanesh Sundrum